

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICK A. DEWATER and DEPARTMENT OF VETERANS AFFAIRS,
CARL T. HAYDEN MEDICAL CENTER, Phoenix, AZ

*Docket No. 00-358; Oral Argument Held February 1, 2001;
Issued April 2, 2001*

Appearances: *Elizabeth Punchios*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability in the form of neck pain causally related to his February 10, 1998 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's oral hearing request.

On February 10, 1998 appellant, then a 49-year-old general maintenance mechanic, sustained facial lacerations and contusions when he was assaulted and placed in a headlock by a patient at the employing establishment. Appellant stopped work on that date and returned to regular duty on February 23, 1998. His claim was accepted by the Office.

Subsequently, appellant submitted progress notes dated September 28, 1998 from Dr. Mark D. Whitaker, an osteopath, stating that appellant complained of occasional upper back and neck pain and headaches. He further stated that appellant asserted that he did not experience those symptoms prior to his February 10, 1998 employment injury. Dr. Whitaker noted several tender points on the thoracic spine and diagnosed "SD CT spine resolving." He opined that appellant was medically stable with breakthrough symptoms that would likely continue.

On November 4, 1998 appellant filed a recurrence of disability claim (Form CA-2a) alleging that he sustained ongoing neck pain and headaches causally related to his February 10, 1998 employment injury. To support his claim, appellant submitted progress notes dated February 17 to November 4, 1998 from a physician whose signature is illegible, noting his symptoms and treatment. The notes stated that appellant complained of neck and back pain.

By letter dated November 24, 1998, the Office requested additional factual and medical evidence to support appellant's recurrence claim. The Office allowed appellant 30 days within which to respond to its request.

By decision dated December 30, 1998, the Office denied appellant's recurrence claim on the grounds that the evidence of record failed to establish that he sustained a recurrence of disability causally related to his February 10, 1998 employment injury.

By letter dated March 19, 1999, appellant requested reconsideration of his claim. To support his request, he submitted a March 12, 1999 report in which Dr. Whitaker provided a history of his February 10, 1998 employment injury and subsequent treatment. Dr. Whitaker stated:

"It is my opinion that the complaints of neck pain and headaches are solely and directly related to the injury which occurred on February 10, 1998 and as such should be acceptable for compensation. [Appellant] has been a patient of mine since August 5, 1996 and at no time did he come to me with any complaints of back pain or headaches. His headaches are of a muscle contraction type as is his neck pain. It is obvious to me and I hope clear to you that a facial blow that could result in laceration and extensive bruising could certainly cause trauma to the cervical spine paravertebral musculature with resulting neck pain and headaches."

Appellant also submitted a January 22, 1999 progress note in which a physician whose signature is illegible diagnosed cervical impingement. Duplicate copies of previously submitted progress notes dated February 10 to September 28, 1998 noting his complaints were entered into the record.

By merit decision dated June 10, 1999, the Office denied appellant's request on the grounds that the evidence of record was insufficient to warrant modification of its December 30, 1998 decision. The Office found that the medical evidence of record did not contain objective findings or medical reasoning relating appellant's back and neck pain to his February 10, 1998 employment injury.

By letter dated June 30, 1999, appellant requested an oral hearing before an Office hearing representative.

By decision dated August 23, 1999, the Office denied appellant's request for an oral hearing on the grounds that he was not entitled to an oral hearing as a matter of right because he previously requested reconsideration of the same issue. The Office further denied appellant's request on the grounds that that issue could equally well be addressed by requesting reconsideration and submitting evidence not previously considered by the Office.

The Board finds that this case is not in posture for decision on the issue of whether appellant sustained a recurrence of disability in the form of neck pain and headaches causally related to his February 10, 1998 employment injury.

The employee has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed recurrence of disability is causally related to the original injury.¹ Such proof must include medical evidence that the claimed recurrence of

¹ *Alfredo Rodriguez*, 47 ECAB 437, 441 (1996).

disability is causally related to the accepted employment injury.² As part of this burden, appellant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.³ Whether a particular employment incident causes disability is a medical issue, which must be resolved by competent rationalized medical opinion evidence.⁴ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on appellant's unsupported belief of causal relation.⁵

The record contains notes and a report from Dr. Whitaker dated February 17, 1998 to March 12, 1999 in which he noted that appellant complained of upper back and neck pain and headaches. In his March 12, 1999 report, Dr. Whitaker concluded that appellant's neck pain and headaches were "solely and directly related to the injury which occurred on February 10, 1998"; however, he did not provide a sufficiently rationalized medical opinion relating those conditions to the February 10, 1998 employment injury. The fact that Dr. Whitaker's notes and report contain deficiencies preventing appellant from discharging his burden of proof, however, does not mean that they completely lack probative value. Rather, the reports are sufficient to require further development of the record especially given the absence of opposing medical evidence.⁶ It is well established that proceedings under the Act⁷ are not adversarial in nature⁸ and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in developing the evidence.⁹ In this case, there is an uncontroverted inference of causal relationship between appellant's condition and the February 10, 1998 employment injury.

On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate Board-certified physician for an examination, diagnosis and rationalized opinion as to the relationship between appellant's neck condition and headaches and his February 10, 1998 employment injury. After such development as is deemed necessary, the Office shall issue a *de novo* decision.

The Board further finds that the Office did not abuse its discretion by denying appellant's oral hearing request.

² *See id.*

³ *Id.*

⁴ *See Buddy L. Spaulding*, 40 ECAB 1002, 1007 (1989).

⁵ *Alfredo Rodriguez*, *supra* note 1.

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

⁷ 5 U.S.C. §§ 8181-8193.

⁸ *Shirley A. Temple*, 48 ECAB 404, 409 (1997).

⁹ *Id.*, *see Dorothy L. Sidwell*, 36 ECAB 699 (1985).

In this case, the Office denied appellant's request for a hearing on the grounds that he was not entitled to an oral hearing as a matter of right because he previously requested reconsideration on the same issue. The Office noted, however, that it considered the request in relation to the issue involved and indicated that appellant's request was further denied on the basis that the issue of whether his alleged recurrence of disability was causally related to his February 10, 1998 employment injury could be addressed equally well through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁰ In the present case, appellant's oral hearing request followed the Office's prior merit decision dated June 10, 1999 in which it considered appellant's request for modification on the same issue. Hence, the Office correctly stated that appellant was not entitled to a hearing as a matter of right.

While the Office has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, in its August 23, 1999 decision, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether his alleged recurrence of disability was causally related to his February 10, 1998 employment injury could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.¹¹ In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion.

¹⁰ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹¹ *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated December 30, 1998 and June 10, 1999 are set aside and the case remanded for further proceedings consistent with this opinion. The decision dated August 23, 1999 is hereby affirmed.

Dated, Washington, DC
April 2, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member